

April 12, 2002

Frank P. Cavallo, Jr., Esq.
Stephen Mushinski, Esq.
Parker, McCay & Criscuolo
Three Greentree Centre, Suite 401
Route 73 & Greentree Road
Marlton, NJ 08053

Thomas J. Coleman, III, Esq.
Raymond & Coleman, LLP
325 New Albany Road
Moorestown, NJ 08057

Kevin M. O'Dowd, DAG
Department of Law and Public Safety
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, NJ 08625

Dear Counsel:

I have reviewed the papers filed in the matters entitled *Board of Education of the Northern Burlington County Regional School District, Burlington County v. William L. Librera and Walter Keiss, Burlington County Superintendent of Schools*, Agency Dkt. No. 26-2/02, and *Township of Mansfield, Burlington County v. William L. Librera and Walter Keiss, Burlington County Superintendent of Schools*, Agency Dkt. No. 37-2/02, wherein the regional Board and the Township of Mansfield respectively request that I revise the County Superintendent's recent reapportionment of the regional Board's nine seats among its four constituent districts. Upon such review, I have determined to consolidate these matters and dismiss each Petition of Appeal, for the reasons set forth below.

The petitioning Board indicates that its current apportionment provides for the following member seating: two seats for Chesterfield Township, two seats for Mansfield Township, four seats for North Hanover Township, and one seat for Springfield Township. (Petition of Appeal at 2) However, on December 14, 2001, the County Superintendent duly notified the Board that, based on the 2000 federal census, Chesterfield would *gain* one seat and North Hanover would *lose* one seat on its nine-member board, the former effective with the April 2002 election and the latter effective with the April 2003 election. Petitioner asserts that, in reapportioning its member seats, the County Superintendent erroneously included in his population figures the inmates of a State facility located in Chesterfield, and further, that he used a methodology inconsistent with the statute governing reapportionment of seats in regional districts with fewer than nine constituents. (*Id.* at 2-3) The petitioning Township objects to the

inclusion of both the inmates in the Chesterfield correctional facility and the military personnel stationed at a federal facility in North Hanover. (Petition of Appeal at 3)

In each case, in lieu of an Answer, respondents filed a Motion to Dismiss the Petition, relying, for purposes of the motion, on the facts as pled by petitioner. The Board filed a response in opposition, while the Township did not.

On the question of including inmates and military personnel, respondents contend that excluding them would constitute a violation of equal protection. Respondents point to the fact that the excluding of military personnel in population counts for purposes of apportionment of members in regional district has already been held impermissible by the courts, *citing Borough of Oceanport v. Hughes et al.*, 186 N.J. Super. 109 (Ch. Div. 1982). While conceding that no New Jersey court has specifically addressed the constitutionality of the portion of N.J.S.A. 18A:13-8 which states that inmates are to be excluded from the population for purposes of apportioning regional board member seats, respondents project that, based on analogous case law as cited within its brief, this provision would likely be struck down if challenged. Thus, respondents aver, by ensuring that all institutionalized citizens are able to participate in the electoral process on an equal basis with other voters, respondents have applied the statute so as to avoid constitutional infirmity. (Brief in Support of Motion to Dismiss [Board's Petition] at 5-8, Brief in Support of Motion to Dismiss [Township's Petition] at 2-4) The Board rejects this view, arguing that, in the absence of specific controlling case law, the statute must be followed as written. (Petitioner's Brief in Opposition to Notice of Motion to Dismiss at 2-3)

On the question of the methodology used for reapportionment, respondents initially note that the County Superintendent's calculations were properly based upon the United States Bureau Census 2000 Redistricting Data Summary, which reflected a 26.5% decline in North Hanover's population and a 15.6% increase in Chesterfield's population since the 1990 census. Based on these shifts, a reapportionment analysis was performed, pursuant to N.J.S.A. 18A:13-9, utilizing the 2000 census figures and resulting addition of a seat for Chesterfield and loss of a seat for North Hanover. Respondents assert that the particular method used for a reapportionment is, according to statute, left to the discretion of the County Superintendent. N.J.S.A. 18A:13-8. Thus, in order to effectuate the statute's goal of apportioning board member seats "as nearly as may be according to the number of [their] inhabitants," N.J.S.A. 18A:13-8, an "equal proportions" formula was utilized to calculate board membership for regional school districts with nine or less constituent districts. (Motion to Dismiss [Board's Petition] at 9-12) As respondents explain, the equal proportions method begins with assigning each school district one representative. Thereafter,

[t]he population of each municipality is divided by the square root of 2, 6 and 12 (geometric mean)*** until the number of quotients so calculated for each community exceeds by at least one (1) the number of additional representatives to be allotted to that municipality.

*** [All quotients are arranged] in sequence beginning with the largest to form a priority list.

***The remaining numbers are allotted to the municipalities having the highest positions on the priority list. (*Id.* at 11)

Respondents contend that such a reapportionment plan should not be disturbed, absent a positive showing of "individual discrimination or other constitutional deficiency." (*Id.* at 11, *citing Davenport v. Apportionment Commission of the State of New Jersey*, 65 N.J. 125, 135 (1974)) Respondents further note that the equal proportions method has been adopted by the United States Congress, after decades of experience, experimentation and debate, and that the New Jersey State Constitution requires its use for apportionment of legislative districts. (*Id.* at 11-12)

To this, the petitioning Board counters that the Legislature established two separate ways to apportion board members in regional districts, and that

Had the legislature intend[ed] the County Superintendent to utilize the equal proportions method in making the apportionment of Board members among constituent districts in a regional district of nine or less constituent school districts, it would [have] explicitly done so in 1972. It is noteworthy that the legislature revisited N.J.S.A. 18A:13-8 in 1979 and 1992. Again, the legislature left untouched the method that the County Superintendent was to utilize in proportioning members of a regional Board of Education consisting of nine or less constituent school districts. (Petitioner's Brief in Opposition to the Notice of Motion at 4)

Thus, the Board asserts that the County Superintendent exceeded his powers in using a methodology for apportionment that is not expressly authorized by statute. Moreover, the Board claims that it has no factual information by which it can be assured that the County Superintendent's action was not arbitrary and capricious, and that it is entitled to discovery "to determine critical facts such as what methodology was utilized for apportionment in following the 1990 census [and] why the County Superintendent utilized the equal proportions method instead of the Huntington Hill method***." (*Ibid.*)

Upon review of the parties' positions, and assuming for purposes of this decision that the Township has standing to bring its appeal, I note that the enabling statute, in pertinent part, provides, with respect to regional boards of education:

If there are nine or less constituent districts, the members of the board of education of the regional district shall be apportioned by the county superintendent or county superintendents of the county or counties in which the constituent districts are situate, among said districts as nearly as may be according to the number of their inhabitants except that each constituent district shall have at least one member.

In making the apportionment of the membership of a regional board of education among the several school districts uniting to create a regional school district having nine or less constituent districts, as required by section 18A:13-36, there shall be subtracted from the number of inhabitants of a constituent school district, as shown by the last Federal census officially promulgated in this State, the number of such inhabitants who according to the records of the Federal Bureau of the Census were patients in, or inmates of, any State or Federal hospital or prison, or who are military personnel stationed at, or civilians residing within the limits of, any United States Army, Navy or Air Force installation, located in such constituent school district. *N.J.S.A. 18A:13-8.*

With respect to the inclusion of military personnel, the Commissioner finds that question to have been clearly resolved by the Court, which has expressly held the portion of the above-cited statute dealing with military and civilian personnel to be unconstitutional and of no effect. *Oceanport, supra.* With respect to inmates in correctional facilities, the Commissioner cannot conclude, in light of the analogous decisional law cited by respondents, the inclusion of state and federal prison inmates in data provided by the United States Census Bureau and the counting of such inmates for purposes of

Congressional districting and legislative apportionment, and in the absence of compelling contrary argument, that the County Superintendent's decision to include such inmates so as to avoid a violation of equal protection was either beyond the scope of his lawful authority or arbitrary and capricious.

With respect to the manner of reapportionment, I am not persuaded by the petitioning Board's assertion that use of the "equal proportions" methodology is improper because the enabling statute does not expressly authorize it. Indeed, the statute does not identify any particular method for effectuating a reallocation of board seats where such is made necessary by promulgation of a federal census, specifying only that board member seats must be reapportioned "*as nearly as may be according to the number of [the constituents'] inhabitants.*" N.J.S.A. 18A:13-8 (emphasis added) Furthermore, petitioners do not dispute respondents' assertion that the 2000 census showed an *increase* in Chesterfield's population and a *decline* in North Hanover's population. Thus, the reapportionment made by the County Superintendent clearly satisfies the statutory provision that seats be assigned to constituent districts "as nearly as may be according to the number of their inhabitants." I find, therefore, that the Burlington County Superintendent neither abused his discretionary authority nor acted in contravention of law when he used the "equal proportions" method to reapportion board member seating among the regional Board's constituents following the 2000 census. I further find that the material facts necessary to decide this matter are already on record, so that there is no need for discovery for the purpose stated by the Board.

Accordingly, respondents' motions are GRANTED and each within Petition of Appeal is DISMISSED.¹ ²

Sincerely,

William L. Librera, Ed.D.
Commissioner

c: County Superintendent

¹ On April 1, 2002, the Township filed a motion for Emergent Relief, seeking a stay of the County Superintendent's reapportionment pending decision by the Commissioner on the merits of its appeal. In view of the decision reached herein, it is unnecessary to address this motion, to which respondents duly replied on April 9, 2002.

² This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to N.J.S.A. 18A:6-27 *et seq.* and N.J.A.C. 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.